Brookfield Dairy, a Division of Hawthorn Mellody, Inc. *and* Office and Professional Employees International Union, Local No. 33, AFL-CIO. Case 6-CA-15389

May 2, 1983

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On December 13, 1982, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Brookfield Dairy, a Division of Hawthorn Mellody, Inc., Sharpsville, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We are satisfied that Respondent's contention that the Administrative Law Judge was biased is without merit. There is nothing in the record to suggest that his conduct at the hearing, his questioning of witnesses, his resolutions of credibility, or the inferences he drew were based on either bias or prejudice. Further, we find no merit in Respondent's assertions that its rights were infringed by its failure to be granted a postponement of the hearing in this proceeding.

[2] Respondent has excepted to the Administrative Law Judge's failure to cite *Wright Line*, 251 NLRB 1083 (1980), in his Decision. As we stated in *Limestone Apparel Corp.*, 255 NLRB 722 (1981), it is unnecessary to set forth formally the *Wright Line* analysis in cases in which the administrative law judge's findings and conclusions fully satisfy the analytical objectives of *Wright Line*. In this case the Administrative Law Judge rejected Respondent's proffered reason for dismissing Mary Kitch as false and pretextual. Implicit within this determination is his finding that Respondent failed to meet its *Wright Line* burden of establishing that it would have taken this action had Kitch not engaged in protected union activities. Accordingly, Members Zimmerman and Hunter agree that the Administrative Law Judge's analysis conforms with the requisite of *Wright Line*. However, Member Jenkins finds *Wright Line* inapplicable to the resolution of this case. In his view a *Wright Line* analysis is appropriate only in dual-motive cases; that is, where there exist both a genuine lawful reason and a genuine unlawful reason for Respondent's action. In view of the Administrative Law Judge's determination that Respondent's asserted lawful reasons for terminating Kitch are pretexts, there is no genuine lawful motive for its action and all that remains is the unlawful one. In such circumstances applying *Wright Line* becomes confusing and misleading.

DECISION

STATEMENT OF FACTS AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge: This proceeding was heard before me in Sharon, Pennsylvania, on October 21, 1982, on an unfair labor practice complaint[1] alleging that Respondent Brookfield Dairy, a Division of Hawthorn Mellody, Inc.,[2] discharged employee Mary Kitch on January 8, 1982, in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (the Act), and violated Section 8(a)(1) of the Act by announcing that Kitch's discharge was caused by her union activities and by discontinuing its "open door" policy whereby employees were free to discuss with Respondent all matters pertaining to their employment. Respondent denied that it violated the Act in any manner.

On September 10, 1981, the Union filed a petition to represent Respondent's office and clerical employees. Kitch, who had previously signed a union authorization card and talked with one employee about the possible benefits of representation, was not at the forefront of the Union's organizing campaign. Indeed, on November 9 or 10, she told Respondent's vice president and general manager, Thomas R. Bohlender, that she did not know whether she was going to vote for the Union in the election then scheduled to be held on November 12. But, on the day before the election, she accepted the responsibilities of union observer and so acted. Several days later, on November 17, she and employee Tenoria "Tena" Sapala were harshly and abruptly told by Bohlender that there was a new policy starting that day—that, contrary to all prior practice and the "open door" policy that Bohlender had previously followed and had reaffirmed in preelection campaign speeches to employees, they were no longer to enter his office, nor to peek in, and that they were not to speak to him directly ("not even to say good morning or good night") but to speak only to Respondent's office and credit manager, Ernie Stefanovsky, or to Bohlender's secretary, Judy Griffiths, both of whom were in attendance.

[1] The relevant docket entries are as follows: The unfair labor practice charge was filed by Charging Party Office and Professional Employees International Union, Local No. 33, AFL-CIO (the Union), on March 30, 1982; and the complaint was issued on May 18, 1982.

[2] Respondent admitted that it is a Delaware corporation with an office and place of business in Sharpsville, Pennsylvania, where it engages in the processing and nonretail sale and distribution of dairy and related products. During the 12 months preceding April 30, 1982, it purchased and received at its Sharpsville facility products, goods, and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. I conclude that Respondent is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and that the Union, as Respondent also admits, is a labor organization within the meaning of Sec. 2(5) of the Act.

Neither Bohlender nor Griffiths testified; and Stefanovsky, who did, did not deny Bohlender's comments. Instead, Stefanovsky merely testified that a new policy had been enacted due to Bohlender's increased responsibilities and desire to shift some of his duties to his two subordinates. However, I find that the new policy was not made known to any of Respondent's other employees, one of whom specifically testified that she was never informed of it, and she and other employees continued to talk with Bohlender. Because Sapala had that same day moved[3] to the cashier's room, had previously testified as a union witness in the representation proceeding, and had previously complained to Bohlender that there was favoritism shown to certain employees, and Kitch (in addition to being the Union's observer at the election) had complained to Bohlender in her November 9 or 10 conversation about the assignment to her of too much overtime and to others of too little, I find that Bohlender wanted to isolate these two apparent union supporters in one room, by themselves, and close the "open door" only to them to demonstrate his displeasure with their activities. I conclude that the formality and strictness of his order was an attempt to intimidate them in order to discourage their exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.[4]

Kitch was laid off from her job on January 8, 1982, after 21 years of employment. Actually, the term "laid off" is a misnomer because Respondent stipulated at the hearing that there never was any intention to recall her to her job. That action is the subject of the principal allegation of the complaint and involves, as all alleged 8(a)(3) violations do, an inquiry into Respondent's motivation. That task is made easier in this proceeding because it was uncontested that Bohlender announced at a cocktail-dinner meeting of its office and clerical employees on February 25, 1982, that he made the decision to "lay off" Kitch, contrary to Stefanovsky's wishes, because she was either "not a loyal" or a "disloyal employee." There was no explanation of why he deemed her "disloyal" and it is not incumbent upon me, as Respondent suggests, to engage in fanciful suppositions.

The American Heritage Dictionary of the English language describes "disloyal" as applying to "one who is false to persons or things due allegiance" and "loyalty" as the state or quality of being "steadfast in allegiance," in this case, to one's employer. Kitch testified that, as far as she could ascertain, she had never been disloyal to Respondent. Because Bohlender did not testify, and there is nothing else in the record which might prove otherwise, I conclude that Kitch's disloyalty could only have been her allegiance to the Union, which Bohlender opposed. Respondent argues that Kitch complained of Stefanovsky's Saturday scheduling as being the possible cause of union organization. But, without Bohlender's explanation of what he meant, the word must be given its reasonable meaning; and, in the circumstances of this proceeding, including Bohlender's immediate action of forbidding Kitch to talk with him and other employees having complained of overtime work, I construe that her disloyalty consisted solely of taking the Union's side in the election process.

Respondent also contends that union activities could not have been the cause of Kitch's discharge because the most open union supporter, Debbie Gertner, was not only not disciplined but promoted to assistant supervisor of the computer department. Whatever appeal that argument may have[5] is outweighed by Bohlender's stated and uncontradicted reason for Kitch's discharge and the fact that Gertner was considered an excellent keypunch operator and, I infer, irreplaceable. Kitch apparently was replaceable, and it was evident that she, too, was a union adherent. Finally, it is not necessary, in finding a violation, that Respondent discipline only the most vocal union supporter. Sufficient damage may be done by selecting a lesser, but more vulnerable, candidate in order for an employer to discourage union activities. *Brown & Connolly, Inc.*, 237 NLRB 271, 285 (1978), enfd. 593 F.2d 1373 (1st Cir. 1979).

An assessment of Respondent's alleged justification for Kitch's discharge must begin with the missing witness, Bohlender, who was clearly in charge of Respondent's operation, but whose absence was explained by his attendance at a Colorado elk-hunting trip in Colorado. Respondent had moved as early as September 20, 1982,[6] for an adjournment of the hearing. That motion and two renewals thereof were denied by the Regional Director. No application to the Board to take a special appeal was filed, and Respondent renewed its motion before me at the hearing. I denied it, noting that once the Regional Director had made his decision not to grant an adjournment, and no appeal having been taken, Bohlender had to make a choice between going on vacation and attending this hearing. That he chose the former, and was actually out of the State when the hearing occurred, does not preclude me from making an adverse inference regarding his failure to testify, particularly in light of his participation with Stefanovsky (if he is to be believed) in the decision to discharge Kitch. *Maxwell's Plum*, 256 NLRB 211, 213 fn. 9 (1981); *NLRB v. Lantz*, 607 F.2d 290, 296 (9th Cir. 1979). Because motivation is at the heart of this matter, it could be expected that Bohlender's explanation of his reasons would be critical; and I conclude that an adverse inference is warranted.[7]

Because of Bohlender's absence and the adverse inference I draw from it, the only remaining issue is whether the testimony of Respondent's two witnesses, Stefan-

[3] Sapala had been told by Stefanovsky on Monday, November 16, to move that day or the following morning.

[4] I find it revealing that, although Sapala was transferred to the cashier's office, she performed exactly the same duties as she did before, and the room she worked in was not critical to her work. Bertha Nurse, who was transferred from that office, was being trained by Kitch as a cashier; yet she was removed from the very location which would have aided her in learning the functions of the cashier.

[5] It appears that the "promotion" was one in name only, not salary or responsibility.

[6] The motion was made approximately 4 months after the complaint was issued and the answer was filed. That was more than ample notice of the date of the hearing herein.

[7] I would be remiss if I did not note that in one of its earlier applications for an adjournment Respondent set forth November 17, 1982, as the first date Bohlender could appear. At the hearing, Respondent's counsel stated that Bohlender would be returning on October 23 or 24 and could appear at the hearing on October 25. I infer that Bohlender really did not want to testify.

ovsky and Grace Sutton, its data processing manager, was so compelling that I should nonetheless find that Bohlender should not be taken at his word and that Respondent had a legitimate reason for discharging Kitch. Both Stefanovsky and Sutton attended the February 25, 1982, meeting, but both refused to affirmatively deny that Bohlender made the statement about disloyalty that two current employees attributed to him. I find that Stefanovsky's and Sutton's professed lack of recall was convenient and not candid, especially when compared with their recollection of other statements made at the same time as the "disloyalty" remark. In addition, Stefanovsky was quite insistent that both he and Bohlender made the decision to discharge Kitch despite Bohlender's statement at the meeting that he alone made the decision, to which Stefanovsky objected. When asked when the decision had been made, under what circumstances, and what his conversations were with Bohlender, Stefanovsky answered so evasively and inconsistently, and with a lack of recall of such magnitude, that I am persuaded that he never discussed the matter with Bohlender or, if he did, he opposed Bohlender's decision, just as Bohlender admitted at the meeting. I am constrained generally to discredit Stefanovsky's testimony in its entirety, except when supported by more reliable witnesses.

Independent of this general credibility resolution, Stefanovsky's attempt to justify Kitch's discharge for reasons other than her union activities has no credible basis. As I understand his testimony, supported by Respondent's brief, the thrust of its case is bottomed on a continuing effort to reorganize its staff, streamline its operations, and make its business profitable. It is true that in June 1981 Respondent laid off six office and clerical employees. Despite its recall of two of them in the following month or two, the remaining employees (including Kitch, who became Respondent's chief cashier) had more tasks to do than they did before the layoffs. Employees worked overtime and some (including Kitch) were required to work on Saturdays in addition to 5 weekdays. Obviously, there was more than sufficient work for all the employees at the time of Kitch's discharge.

I find that Respondent's defense of a continuing reorganization has not been proved. Only Kitch was discharged from the office and clerical department from June 1981 until the date of the hearing in this proceeding. Her cashier's job was assumed by Bertha Nurse, whom Kitch had been instructing in those duties for 3 months or more. Other employees helped out Nurse in her cashier's duties, including Linda McMath, who was formerly a full-time laboratory technician,[8] left Respondent's employ on maternity leave, and returned on May 17, 1982, as a part-time cashier. Kitch's other duties were assumed by other employees, including Kathleen Blasko, who was one of the two employees laid off in June 1981. She was recalled to work in July 1981 and quit in September. About a month after Kitch was discharged, Blasko was rehired to take customer phone orders, work which Kitch had performed and was capable of performing. Her rehire, after she had quit 5 months before, is most persuasive evidence that Kitch was not released because of any business consideration or necessity.

That Blasko had no experience in data processing work also belies Stefanovsky's contention that Respondent needed to employ persons with such a background.[9] In fact, no one had been hired to do such work up to the date of the hearing and it was not anticipated that anyone would be hired to work with the computer until at least January 1983. Stefanovsky's final reliance upon the fact that a new telephone system was being installed was wholly unsupported; indeed, on January 8, 1982, the day Kitch was discharged, she was scheduled to be trained on the new telephone system on January 19.[10] Finally, there is some suggestion that Respondent was dissatisfied with Kitch's work and lack of skills. That is belied by the fact that, after the June 1981 layoff, she was given more work to do and greater responsibilities, and no one complained that she was doing her assigned work badly or untimely; the fact that Respondent increased her wages in August 1981, when Bohlender commented that she "deserved" the increase; and the fact that Nurse, who had formerly been a chief cashier with another employer, had to be trained for 3 months or more to learn Respondent's cashier's job. I infer that when Nurse learned what Kitch had been doing Kitch became expendable and Respondent discharged her for her union activities.

Respondent complains that the General Counsel's case is, at best, circumstantial. Even if it were, employers rarely are so outspoken and daring that they publicly announce that disciplinary action was taken for reasons which violate the Act. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Here, the circumstances are overwhelming and by no means create mere suspicions. Bohlender came as close to openly stating an illegal motivation as one can imagine. Respondent's professed reasons for firing Kitch are not only pretextual but also false. I conclude, therefore, that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Kitch and by announcing that its discharge was because of her union activities.[11] *Operating Engineers Local 12*, 237 NLRB 1556 (1978); *H. B. Zachry Co.*, 261 NLRB 681 (1982).

[8] Stefanovsky testified that he "believed" that McMath was employed in the customer order department. However, McMath was classified on Respondent's *Excelsior* list as a laboratory technician, where she checked the butter fat content of and performed bacteria counts on Respondent's products.

[9] Stefanovsky's niece, who was hired in late January 1982, a few weeks after Kitch was discharged, had some experience in word processing and data entry. She was not hired, however, to do that work. Rather, she was a telephone operator and a secretary, having typing and "other" skills, stated Stefanovsky. She, too, performed work formerly done by Kitch.

[10] Earlier, Respondent distributed a schedule for Saturday work during December 1981 and January 1982. Kitch was scheduled to work on January 9, 23, and 30, 1982.

[11] The General Counsel alleges that illegal motivation is also supported by Respondent's removal of Kitch's desk in the cashier's room and its request of Kitch to move her work location to the cashier's counter, which Kitch found uncomfortable to sit at. Because customers would come to the counter to be serviced, I do not find Respondent's direction to be without business justification or imposed because of Kitch's union activities.

The activities of Respondent set forth above, occurring in connection with its operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to result in labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, I shall recommend that it cease and desist therefrom, post an appropriate notice, and take certain affirmative action designed to effectuate the purposes and policies of the Act, including an order requiring Respondent to offer Mary Kitch immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and to make Kitch whole for any loss of earnings she may have suffered by reason of her discharge on January 8, 1982, by paying her a sum of money equal to that which she normally would have earned absent the discharge, less earnings during such period, to be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).[12] I shall also recommend, in accordance with *Sterling Sugars*, 261 NLRB 472 (1982), that Respondent expunge from its records any reference to its unlawful discharge of Kitch and so notify her in writing.

Upon the above findings of fact and conclusions of law and the entire record[13] in this proceeding, including my observation of the demeanor of the witnesses as they testified and my consideration of the briefs filed by the General Counsel and Respondent, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[14]

The Respondent, Brookfield Dairy, a Division of Hawthorn Mellody, Inc., Sharpsville, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discontinuing its "open door" policy in order to discourage its employees from engaging in union activities and to retaliate for their having engaged in union activities.

(b) Informing its employees that other employees have been laid off, discharged, or otherwise disciplined for engaging in union activities.

(c) Discharging and laying off its employees because of their membership in, assistance to, or activities on behalf of Office and Professional Employees International Union, Local No. 33, AFL–CIO, and in order to discourage them from supporting the Union.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Mary Kitch immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of Respondent's discrimination against her in the manner set forth in "The Remedy" section of this Decision.

(b) Expunge from its files any reference to the discharge or layoff of Mary Kitch and notify her in writing that this has been done and that evidence of her unlawful discharge will not be used as a basis for future personnel actions against her.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Sharpsville, Pennsylvania, copies of the attached notice marked "Appendix."[15] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[12] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[13] The General Counsel moved to correct the official transcript in certain respects. There being no objection, the motion is granted and the transcript is hereby amended accordingly.

[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discontinue our "open door" policy in order to discourage our employees from engaging in union activities and to retaliate for their having engaged in union activities.

WE WILL NOT inform our employees that other employees have been laid off, discharged, or otherwise disciplined for engaging in union activities.

WE WILL NOT discharge and lay off our employees because of their membership in, assistance to, or activities on behalf of Office and Professional Employees International Union, Local No. 33, AFL–CIO, and in order to discourage them from supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Mary Kitch immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of our discrimination against her, with interest.

WE WILL expunge from our files any reference to the discharge or layoff of Mary Kitch and notify her in writing that this has been done and that evidence of her unlawful discharge will not be used as a basis for future personnel actions against her.

BROOKFIELD DAIRY, A DIVISION OF HAWTHORN MELLODY, INC.